IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 56179-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
GARY E. WOLF, a.k.a. GARY E. SPENCER,	)	
	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: July 31, 2006
	)	
	)	

COX, J. – Evidence for a criminal conviction is sufficient where "after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime] beyond a reasonable doubt."[1] The State has this burden to prove a criminal charge.[2] But a defendant may waive this proof requirement to the extent that he or she stipulates to an element of a charged crime.[3] Here, the charge was that Gary Wolf was a felon in possession of a firearm. He stipulated to a necessary element of that charge: having been convicted of a prior serious offense. He did so in order to keep the

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[1] State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

[2] In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

[3] United States v. Harrison, 340 U.S. App. D.C. 198, 204 F.3d 236, 240 (2000).

name of the offense from the jury in this case.[4] The stipulation was never admitted into evidence. But by stipulating to the element, he waived the right to put the State to its burden of proof. There being no other argument in this case requiring reversal, we affirm.

Responding to a late night 911 call reporting a possible assault in an alley, the police found Wolf next to a stalled SUV. Christina Eakins was in the driver's seat. Upon questioning, Wolf presented a driver's license in the name of Roger Eakins, Christina Eakins' father. After learning that there was a no-contact order in place between Eakins and her father, the police arrested Wolf, who they thought was Eakins, for violating it. In a search incident to arrest, the police discovered a gun under the seat of the vehicle. Wolf told the officers the gun belonged to him. Because Roger Eakins was also a convicted felon, the police arrested Wolf for being a felon in possession of a firearm. Following a subsequent fingerprint check, police discovered Wolf's true identity. They also learned that Wolf was a convicted felon and that there was also a court order in place prohibiting his contact with Eakins.

The State charged Wolf with Unlawful Possession of a Firearm (UPFA) in the Second Degree and Domestic Violence – Misdemeanor Violation of a Court Order. After the charge, Wolf continued to violate the no-contact order, and the State added two counts of Domestic Violence Misdemeanor Violation of a Court

[4] Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (holding that, in a "felon in possession of a firearm" prosecution, the trial court abused its discretion in allowing evidence of name and nature of the prior assault offense, where accused offered to stipulate to prior conviction).

Order. Subsequently, the State amended the initial charges to UPFA in the First Degree and Domestic Violence Felony Violation of a Court Order.

Wolf pled guilty to the two misdemeanor Violation of a Court Order counts. For purposes of the UPFA count, Wolf stipulated that he had previously been convicted of a serious offense.[5] He did so prior to voir dire. Before the pretrial hearing, Wolf agreed that the fact of the stipulation would be included in a jury instruction.

The court denied Wolf's motion to sever the two charges which had been joined for trial. During the presentation of the evidence, no one read Wolf's stipulation to the jury. The jury convicted Wolf of Unlawful Possession of a Firearm in the First Degree and felony Violation of a Domestic Violence Court Order.

This appeal followed.

WAIVER

Wolf argues that the jury lacked sufficient evidence to find him guilty beyond a reasonable doubt of UPFA. Specifically, he maintains that the State failed to prove that he had been convicted of a prior serious offense, a

[5] RCW 9.41.040(1)(a) reads:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm ***after having previously been convicted*** [or found not guilty by reason of insanity] ***in this state or elsewhere of any serious offense*** as defined in this chapter. (emphasis added).

necessary element of the charged offense because the State failed to offer his stipulation into evidence. It is undisputed that the State did not offer the stipulation into evidence and that the fact of the stipulation was part of a jury instruction that the court read to the jury.

While Wolf argues that he raises a sufficiency of evidence question, that is not the dispositive issue. Rather, the dispositive issue is whether he waived the requirement that the State prove the element he now contests by stipulating to that element.

The premise of the waiver theory is that, upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element.[6] "A stipulation is an express waiver . . . conceding for the purposes of the trial the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it."[7]

It is well settled in cases that have considered the issue that a defendant, by entering into a stipulation, waives his right to assert the government's duty to present evidence to the jury on the stipulated element.[8] We hold that Wolf

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[6] Vander Linden v. Hodges, 193 F.3d 268, 279 (4th Cir. 1999) (quoting 9 Wigmore on Evidence § 2588, at 821 (Chadburn rev. 1981)) (also citing 2 McCormack on Evidence § 254 (West 1992) (stipulations "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact")).

[7] Key Design, Inc. v. Moser, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999) (citations omitted).

[8] See, e.g., United States v. Meade, 175 F.3d 215, 223 (1st Cir. 1999); United States v. Melina, 101 F.3d 567, 572 (8th Cir. 1996); United States v. Mason, 85 F.3d 471, 472 (10th Cir. 1996); United States v. Keck, 773 F.2d 759,

waived the right to put the State to its burden of proof on the element of having previously been convicted of a serious offense by his written stipulation.

In three cases directly on point, the Fifth, Eleventh, and D.C. Circuit Courts of Appeals have held that a stipulation waives the government's burden to introduce evidence on that stipulation, including a reading to the jury of the stipulation itself.[9]

In United States v. Hardin, the defendant was charged with violating the federal UPFA statute and stipulated to a prior conviction. Despite reference to the stipulation during voir dire and arguments, the stipulation was never read to the jury.[10] The court concluded that "[the defendant] waived his right to have the government produce evidence of his felon status, including the stipulation itself" and thus had "no legal or equitable basis to contest the government's mistake."[11]

The Fifth Circuit reached the same result in United States v. Branch.[12] The defendant was convicted of bank fraud. He had stipulated that a number of the financial institutions involved were federally insured, a necessary element of the crime; but the stipulation was never read to the jury. The court of appeals

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769-70 (7th Cir. 1985); United States v. Houston, 547 F.2d 104, 107 (9th Cir. 1976) (per curiam).

[9] United States v. Hardin, 139 F.3d 813, 816 (11th Cir. 1998); United States v. Branch, 46 F.3d 440, 442 (5th Cir. 1995).

[10] Hardin, 139 F.3d at 814.

[11] Hardin, 139 F.3d at 816-17.

[12] 46 F.3d 440.

affirmed on waiver grounds: "Once a stipulation is entered, even in a criminal case, the government is relieved of its burden to prove the fact which has been stipulated by the parties. Appellant . . . cannot now claim that the government failed to offer evidence on an element to which he confessed."[13]

Subsequently, in United States v. Harrison, the D.C. Circuit discussed both Branch and Hardin in rejecting Harrison's argument that his conviction for unlawful possession of a firearm should be reversed because his stipulations to two elements of the offense were not read to the jury.[14] Harrison also noted that, though the Ninth and Fourth Circuits have, at first blush, appeared to disagree with the reasoning of Hardin and Branch, those cases are distinguishable.[15]

First, in United States v. James,[16] the Ninth Circuit reversed a conviction for the State's complete failure to introduce evidence on a stipulated element of the crime. The record showed that the parties had agreed to a stipulation on an aspect of the case, but the stipulation was neither mentioned to the jury nor placed in the record. The court of appeals could not, therefore, have inferred that the stipulation was sufficient to satisfy the element.[17] Although the court

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[13] Branch, 46 F.3d at 442 (citing United States v. Harper, 460 F.2d 705, 707 (5th Cir. 1972) and Poole v. United States, 832 F.2d 561, 565 (11th Cir. 1987)).

[14] Harrison, 204 F.3d at 241-42.

[15] Id. at 241.

[16] 987 F.2d 648 (9th Cir. 1993).

[17] See id. at 650-51.

further noted that "the stipulation was never entered into evidence or read to the jury" so that there was "no fact in evidence that the jury could take as proved,"[18] it is not clear what distinction the court meant to draw with this statement. Under the facts of that case, it did not matter because the stipulation was not available to review on appeal.

Second, in United States v. Muse,[19] the court's opinion includes language that appears to require that a stipulation be read to the jury, but that language is dicta.[20] Though the court arguably contemplated a formal reading to the jury of all necessary stipulations, that issue was not before the court. The stipulation was read aloud in Muse[21] -- the actual issue was the propriety of a jury instruction.[22] Therefore, while the Muse court accurately described normal trial practice to include the reading of stipulations, it had no occasion to consider the situation now before us.

In discussing this issue, Harrison stated, “there is little to be gained from holding that a stipulation, which unarguably waives a defendant's right to require the government to produce any evidence regarding that stipulation, nevertheless

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[18] Id. at 651.

[19] 83 F.3d 672 (4th Cir. 1996).

[20] See Hardin, 139 F.3d at 817 (holding that references to reading stipulations in Muse are dicta); see also United States v. Jackson, 124 F.3d 607, 616-17 n.8 (4th Cir. 1997) (questioning the validity of Muse).

[21] See 83 F.3d at 678.

[22] See id. at 677.

fails to waive the defendant's right to require that stipulation to be read to the jury."[23] While acknowledging that the prosecution's failure to read a stipulation to the jury may not be good trial practice, the court noted "nothing in either law or logic compels us to reverse a conviction when the defendant enters into a stipulation on an element and then seeks a windfall from the government's failure to formally read the stipulation to the jury."[24]

Here, prior to trial, Wolf and the State entered into a written stipulation that Wolf had previously been convicted of a serious offense: "The undersigned parties hereby stipulate for the purposes of the trial in the above captioned case that the defendant has previously been convicted of a serious offense." The parties discussed the stipulation and agreed that it would be presented to the jury in the form of a jury instruction. The wording of the instruction that was given to the jury was nearly identical to the stipulation itself: "The parties hereby stipulate for the purposes of the trial . . . that the defendant has previously been convicted of a serious offense."[25] The stipulation was also mentioned by both parties in closing argument.[26]

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[23] Harrison, 204 F.3d at 242.

[24] Id. at 242.

[25] Jury Instruction No. 7.

[26] The Ninth Circuit has held that a concession made during closing argument is a binding judicial admission that may not be challenged on appeal; United States v. Bentson, 947 F.2d 1353, 1355 (9th Cir. 1991); accord In re Lynch, 114 Wn.2d 598, 603, 789 P.2d 752 (1990) ("In the course of his argument and in response to questions from the court, he made certain statements which are binding against him as judicial admissions.").

By having stipulated to a necessary element of the charged crime, Wolf waived the right to require the State to prove that element beyond a reasonable doubt. There is no persuasive distinction here from the rule set down in Harrison and the other cases we have cited in which the courts were faced with the identical issue.

Wolf's argument that a jury instruction does not constitute "evidence" is inapposite. Having stipulated to a necessary element of the charge, there was no requirement for the State to present any evidence on that element.

The cases on which Wolf relies do not stand for the proposition that a stipulation must be read to the jury during the evidence portion of the trial. Old Chief v. United States[27] and State v. Johnson[28] hold that a defendant may elect to stipulate to the existence of a prior criminal conviction rather than allow the jury to hear the specific nature of the conviction. Wolf did so in this case. But having done so, Wolf now "has no legal or equitable basis to contest the government's [failure to read the stipulation to the jury]. He received [the] benefit of the bargain – prejudicial information about his prior conviction never entered into the jury's deliberations."[29]

It is unnecessary for us to decide how a trial court should deal with a

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[27] 519 U.S. 172.

[28] 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

[29] Hardin, 139 F.3d at 817.

written stipulation of the parties to an element of a charged crime. Here, the parties agreed that the stipulation would be included in a jury instruction. It is also conceivable that a court might simply tell the jury that certain matters have been the subject of a stipulation and that the jury need not concern itself with such matters. It is also possible that the parties might choose to tailor pattern jury instructions to the specifics of their cases, with the limitations of those instructions in mind.[30] In any event, these questions are not before us and we do not decide them.

We conclude that Wolf waived the right to put the State to its burden of proof on the element to which he stipulated. Having resolved the dispositive issue, we need not reach the State's invited error argument.

We affirm the judgment and sentence.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

Severance of Charges

Wolf also contends that the court abused its discretion in denying his CrR 4.4 motion to sever the UPFA count from the assault count at trial. We hold the court properly exercised its discretion in deciding this motion.

A denial of a CrR 4.4(b) motion to sever multiple charges is reviewed for a manifest abuse of discretion.[31] "Defendants seeking severance have the burden

[30] See, e.g., WPI 6.10.01 and 6.10.02. But note the comments to those pattern instructions.

[31] State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy."[32]

Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.[33] Any possible prejudice is mitigated where (1) the State's evidence is strong on each count; (2) the defenses to each count are clear; (3) the court instructs the jury to consider each count separately; and (4) the evidence of each count is admissible on the other count.[34]

We disagree with Wolf's contention that the cases he cites support the view that the "primary concern must be whether the jury could be reasonably expected to keep the testimony and evidence of each offense separate."[35] It is well-settled by our supreme court that a primary consideration is judicial economy with other factors also influencing the decision.[36] It is true that in State

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[32] Id. at 718.

[33] State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

[34] Russell, 125 Wn.2d at 63.

[35] Appellant's Brief at 24 (citing State v. Gatalski, 40 Wn. App. 601, 607, 699 P.2d 804 (1985) and State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993)).

[36] Kalakosky, 121 Wn.2d at 537 ("In Bythrow, we considered the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, whether the judge instructed the jury to decide each count separately, and we strongly

v. Thompson,[37] the court stated that "severance may be warranted in a case involving an [UPFA] charge joined with other counts." But the court there did not consider Thompson's claim that he was prejudiced by denial of severance because he had not raised the issue below. Rather, the court addressed only Thompson's constitutional claim that admission of the prior conviction necessary to prove the felon in possession count compelled him to give evidence against himself.[38] We agree with the court where it noted that "[a]s in all severance cases . . . where a defendant shows that undue prejudice would result from trying the counts together, the trial court will grant a properly made motion to sever."[39]

Moving to the question of prejudice, we conclude that Wolf has not shown that he was unduly prejudiced by trying the counts together.[40] The State's evidence was of similar strength and character on each count. It presented the testimony of Eakins on the assault charge, supported by her booking photo taken the night of the incident which showed a facial scratch and black eyes. In addition, the witness who placed the 911 call testified that he heard a woman screaming loudly for help in the alley below his apartment. He also heard a man

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weighed the concern for judicial economy.").

[37] 55 Wn. App. 888, 893, 781 P.2d 501 (1989).

[38] Thompson, 55 Wn. App. at 893.

[39] Id.

[40] See Thompson, 55 Wn. App. at 892.

yelling back which indicated a domestic violence situation was occurring in the place where police discovered Wolf and Eakins minutes later. As for the UPFA count, police had, in addition to Eakins' testimony, Wolf's admissions that the gun was his.

Wolf's defense to each count was the same – general denial. He claimed that he had not been with Eakins for several days prior to the arrest and that her entire testimony was a lie. The court properly instructed the jury that Wolf was charged with two separate crimes, that it must decide each count separately, and that their verdict on one should not control their verdict on the other.

Evidence of each count would not have been cross admissible in a trial on the other count. But this factor is not dispositive.[41] The trial court found that while not all of the evidence was cross admissible, there was enough cross admissible evidence to weigh in favor of the judicial economy of a single trial. The evidence relating to each count was not difficult to compartmentalize, and the evidence of both offenses was connected by time and place. Witnesses for both counts were substantially the same and the evidence overlapped.

Wolf contends, however, that jury compartmentalization of the evidence was precluded by the limiting jury instruction proposed by the defense and the State's method of trying the case. He asserts that the instruction, as well as the State's actions, made it impossible for the jury to compartmentalize the two crimes, which unduly prejudiced him. He maintains that the prejudice is evident

[41] State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

from various individual jurors' responses during voir dire.

During voir dire, several jurors, in response to defense counsel's questions, stated that they had either given money or belonged to anti-handgun organizations, or favored more restrictive gun laws. None however, indicated a belief that no one should have guns or that the gun charge would influence them in weighing the evidence on the separate counts.

In addition, Wolf's assertion that his prior conviction or the existence of a no-contact order would create bias against him is based on a statement taken out of context. He claimed that a juror stated that "her belief in the credibility of a single witness would depend on whether that person was a 'high quality person.'" The juror's statement was in response to the State's question about how many witnesses it would take to prove a case. The prosecutor asked "What if the State only brings one witness in?" The juror replied: "It just depends upon the quality of that. If it is a high quality person, that would be fine." Finally, though another juror worked for an emergency shelter where his duties involved signing reports of domestic violence, he indicated that he had no direct contact or actual reporting duties when it came to domestic violence incidents. He indicated no prejudice as a result of that.

Though the State's theory linked the gun possession charge and the assault charge through Eakins' testimony, the key evidence on the gun possession charge came from police officers on the scene testifying to Wolf's own statements. Moreover, the jury was instructed to consider the evidence on

each count separately. "When [as here] the issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence."[42]

We conclude that there was no undue prejudice and, under these circumstances, the trial court did not abuse its discretion in declining to sever the counts.

Ineffective Assistance of Counsel

Wolf contends that any inherent prejudice in joining the counts was aggravated by counsel's deficient performance in proposing a confusing limiting instruction. We disagree.

First, to prove ineffective assistance of counsel, the defendant must show deficient performance.[43] This court's scrutiny of counsel's performance is highly deferential and the reviewing court indulges in a strong presumption of reasonableness.[44] If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim.[45]

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[42] Bythrow, 114 Wn.2d at 721 (citing United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978)).

[43] Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[44] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

[45] State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Second, the defendant must show prejudice -- "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[46] Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[47] The question is whether counsel's assistance was reasonable considering all of the circumstances.[48]

Wolf testified in his own defense. In addition to his stipulated prior serious felony conviction that proved an element of the UPFA charge, the trial court admitted a prior theft conviction for impeachment purposes.

The jury was given Instruction 7, which informed them of the stipulation to the prior offense. In addition, by agreement of the parties, the jury was given the following instruction related to the theft conviction:

> Other than the stipulation of the parties, as stated in instruction #7, evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt in this case. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.[49]

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[46] State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (quoting Strickland, 466 U.S. at 687).

[47] Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694).

[48] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

[49] Jury Instruction No. 6. The instruction was based on WPIC 5.05, with the added exception referring to the stipulation.

In context, the instruction was not confusing. In closing, the State specifically referenced the theft conviction, but not the prior stipulated offense as a factor weighing on Wolf's credibility. Defense counsel referred to Wolf's prior convictions in closing, and discussed at some length the jury's proper use of Wolf's criminal history. Counsel's performance was not deficient.

Moreover, because the limiting instruction did not create either confusion or undue prejudice, Wolf was not prejudiced by defense counsel's agreement with the wording of the limiting instruction.

There was no ineffective assistance of counsel.

Impeachment Evidence

Wolf contends that the trial court abused its discretion when it prohibited the defense from eliciting testimony regarding Eakins' reputation for truthfulness. He further argues that the court erred in refusing to permit defense counsel to impeach Eakins on cross examination by questioning her about a prior allegation of attempted rape she made against Michael Spencer, the defendant's brother. We reject these contentions.

Reputation Testimony

At trial, Wolf called Rebecca Tatum, Michael Spencer's live-in girlfriend. Tatum and Eakins were from the same hometown and had gone to high school together. In addition, Eakins and Wolf had been living with Spencer and Tatum

during the time the offenses occurred.

This court reviews evidentiary rulings for abuse of discretion.[50] The trial court abuses its discretion when it acts in a manner that is "manifestly unreasonable or based on untenable grounds or reasons."[51] ER 608 provides: "(a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, . . ."

To establish a foundation for admission of reputation evidence, the party offering it must show that the community whose views the witness purports to reflect is both "neutral" and "general."[52] The community can be small -- consisting, for example, of "close-knit" business associates.[53] Whether the community is "neutral" and "general" depends on such relevant factors as the number of people in the community, the frequency of contact among members of the community, the length of time the person has been known in the community, and the person's community role.[54]

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[50] State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

[51] Land, 121 Wn.2d at 500.

[52] State v. Lord, 117 Wn.2d 829, 874, 822 P.2d 177 (1991).

[53] Land, 121 Wn.2d at 500.

[54] Id. at 500-01; see also State v. Callahan, 87 Wn. App. 925, 936, 943 P.2d 676 (1997) (Weyerhaeuser Company workplace is a "community").

Here, after voir dire of Tatum out of the jury's presence, the court found that there was insufficient foundation to show knowledge of reputation in a neutral and generalized community. The court also found that given an absence of two years since Tatum left that community, Tatum lacked present knowledge of Eakins' reputation for truthfulness there.

In State v. Lord[55] and State v. Callahan,[56] the reviewing courts upheld the trial court's exclusion of reputation testimony because of remoteness. In Lord, the defense wanted to call several witnesses to impeach two prisoners who testified against the defendant. But the trial court excluded the testimony because, among other reasons, two of the impeaching witnesses had no contact with the prisoners for several months before trial.[57] In Callahan, the defense wanted to call a witness who would support a self-defense theory by testifying that the victim had a reputation for violence. But the impeaching witness had no knowledge of the victim's reputation in the two years before the defendant shot him in the hand.[58]

The trial court here did not abuse its discretion in excluding the reputation testimony.

Specific Prior Acts/Impeachment

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[55] 117 Wn.2d 829.

[56] 87 Wn. App. 925.

[57] Lord, 117 Wn.2d at 873-75.

[58] Callahan, 87 Wn. App. at 935.

While criminal defendants have a right to cross-examine and confront witnesses, these rights are not absolute and are limited by general considerations of relevance.[59] A court may properly prohibit inquiry regarding prior allegation evidence where the prior incident is remote or the proof of the prior allegations and their falsity is weak.[60]

Here, the court excluded the impeachment questions as irrelevant. Moreover, the record is insufficient to show that Eakins made a false allegation. Information regarding this prior incident was contained in a defense interview transcript that is not part of the record on appeal. In argument, as in the briefs, there appears to be disagreement between the parties as to the nature of the allegation and Eakins' subsequent retraction. Apparently, no allegation of rape was reported to authorities – to whom it was "reported" is not clear. Moreover, there is disagreement whether Eakins later admitted she "lied" about the incident, or had simply "misunderstood" what had occurred. Given the record available on appeal, we conclude that the court did not abuse its discretion in prohibiting this form of impeachment.

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[59] State v. Darden, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002).

[60] See State v. Demos, 94 Wn.2d 733, 736-37, 619 P.2d 968 (1980) (evidence of prior allegations is irrelevant absent proof of falsity); State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (evidence that a rape victim has accused others is not relevant and, therefore, not admissible, unless the defendant can demonstrate that the accusation was false); State v. Mendez, 29 Wn. App. 610, 611-12, 630 P.2d 476 (1981) (the trial court was within its discretion in excluding prior allegation since the date of the allegation was unknown).

Cumulative Error

Wolf contends that, even if none of the claimed errors alone warrant reversal, the accumulation of error warrants reversal of his conviction.

Because there was no error, the cumulative error doctrine has no application to the facts of this case.[61]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Schindler, ACJ

Coburn, J.

[61] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (numerous errors, harmless standing alone, can deprive a defendant of a fair trial).